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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 THOMAS FRANCO,

11 Defendant.

Case No. 2:16-cr-00308-HDM-PAL

**REPORT OF FINDINGS AND
RECOMMENDATION**

(Mot Suppress Evid – ECF No. 23)

12 Before the court is Defendant Thomas Franco’s Motion to Suppress Evidence Due to
13 Fourth Amendment Violations (ECF No. 23) which was referred to the undersigned for a Report
14 of Findings of Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB1-4 of the Local
15 Rules of Practice. The court has considered the motion, Franco’s Notice of Manual Filing (ECF
16 No. 24), the government’s Opposition (ECF No. 33), Franco’s Reply (ECF No. 38), and the
17 testimony at the evidentiary hearing conducted February 14, 2017. Raquel Lazo and Heidi Ojeda
18 appeared on behalf of Franco, and Phillip Smith appeared on behalf of the government.

19 **BACKGROUND**

20 **I. The Indictment**

21 Defendant Thomas Franco (“Franco”) is charged in an Indictment (ECF No. 1) returned
22 November 1, 2016, with one count of felon in possession of firearm in violation of 18 U.S.C.
23 §§ 922(g)(1) and 924(a)(2). The indictment arises out of an arrest by officers of the Las Vegas
24 Metropolitan Police Department (“LVMPD”) on June 7, 2016, in a Wal-Mart parking lot. LVMPD
25 officers observed a Honda Accord driving westbound on Lake Mead. Using binoculars, one of
26 the officers observed the vehicle’s license plate. A records check on the plates through the Nevada
27 Department of Motor Vehicles showed a “no return”. The driver pulled into the Wal-Mart parking
28 lot and officers conducted a traffic stop of the vehicle in the parking lot. Franco was the driver of

1 the vehicle. Officers investigated and eventually searched the vehicle finding bullets in a Crown
2 Royal bag on the floor board and a gun in an empty center console area. Officers determined that
3 Franco was a convicted felon and arrested him for felon in possession of a firearm.

4 **II. The Parties' Positions**

5 **A. Franco's Motion to Suppress**

6 In this motion, Franco argues he was stopped without reasonable suspicion as he parked in
7 the Wal-Mart parking lot. Within a minute of the stop, he was physically removed from the
8 vehicle, laid over the hood of the patrol car, handcuffed and frisked. The motion argues that this
9 constituted a de facto arrest without probable cause. He seeks to suppress all physical tangible
10 evidence as well as any incriminating statements arising out of the stop and arrest. The motion
11 maintains that LVMPD officers violated Franco's Fourth Amendment rights by seizing him
12 without reasonable suspicion and arresting him without probable cause. The motion also argues
13 that Franco's Fourth Amendment rights were violated when officers illegally searched the Honda
14 without a warrant, and without probable cause.

15 An officer's report justifies the search of the Honda as a "inventory search." However, a
16 tow was not called until almost four hours after the initial stop. The motion anticipates the
17 government's argument but disputes that police would have inevitably discovered the
18 incriminatory contents of the vehicle in an inventory search. The discovery indicates the vehicle
19 Franco was driving had "cold plates," *i.e.*, the license plate did not belong to the vehicle. The
20 owner, Sarah Alley West ("Sarah" or "Ms. West"), eventually emerged from the Wal-Mart and
21 admitted that she was the one who had placed the plates on the car. Franco also disputes that the
22 government will be able to prove a lawful inventory search occurred in furtherance of a community
23 caretaking purpose. Officers lacked a valid justification to impound the Honda under LVMPD
24 policy, which only provides 12 circumstances that justify impoundment, none of which were
25 present in this case. A copy of the LVMPD impound policy is attached as Exhibit I to the motion.
26 Franco maintains that the Honda was lawfully parked in the parking lot of the Wal-Mart and was
27 not impeding traffic, or threatening public safety or convenience where it was parked. Under
28 department policy, the officers should have left the car parked in the parking stall as they had no

1 legal right to impound it. Alternatively, the officers should have permitted the owner of the vehicle
2 to drive it away. The officers' unconstitutional actions resulted in the recovery of bullets, a gun,
3 and Franco's DNA, which the court should suppress as the fruit of an unlawful search and seizure.

4 **B. The Government's Opposition**

5 The government opposes the motion arguing that the police report and body-cam videos
6 attached as Exhibits A and B to defendant's motion establish that a traffic stop was conducted on
7 a vehicle with fictitious plates in the Wal-Mart parking lot. Prior to the stop, police officers
8 determined the vehicle had been "cold-plated". The driver of the vehicle began to get out before
9 officers made contact with him. Franco was ordered out of the car, and as he stepped out of the
10 car, a small metal item fell from his waistline and fell on the ground. This item was discovered to
11 be a "shaved" key, an item commonly used to steal vehicles. As a result, Franco was immediately
12 detained. After receiving *Miranda* warnings, Franco claimed he had no knowledge of the fictitious
13 plates, and that he had given a ride to his friend, Sarah, who was inside the Wal-Mart store
14 shopping. Franco told the officers the vehicle was hers.

15 The government acknowledges that Sarah subsequently came out of the Wal-Mart and told
16 officers that Franco had given her a ride, and that she had placed fictitious plates on the car to
17 avoid being stopped. However, while obtaining the Vehicle Identification Number ("VIN"), an
18 officer noted that the steering column had been tampered with, and the center console was missing
19 the stereo component, which were indications of a stolen vehicle. A records check of the VIN
20 showed that the license plate associated with the vehicle had been suspended, and was different
21 than the one that was on the vehicle. Because of the vehicle's "questionable status" about who
22 had rightful possession and/or ownership, and the fact that the vehicle could not lawfully be driven
23 on public roadways, the officers decided to have it towed.

24 The government claims that the police located a small bag containing pistol ammunition
25 on the passenger side floorboard, and a loaded Ruger 9mm semi-automatic handgun inside the
26 center console area where the stereo should have been. Sarah was questioned and denied that the
27 handgun belonged to her. The firearm was recovered pursuant to a state telephonic search warrant.
28 The LVMPD crime laboratory later issued a report indicating that the defendant's DNA was on

1 the holster which contained the firearm. Additionally, on June 14, 2016, Franco allegedly told
2 somebody in a recorded jail phone call that he “got caught with a burner,” a term commonly used
3 for a firearm.

4 The government argues that officers had reasonable suspicion to immediately detain
5 Franco and developed probable cause to arrest him. The collective knowledge of all officers
6 involved in a criminal investigation may be considered to determine if a detention or arrest
7 complies with the Fourth Amendment. Here, the police had at least reasonable suspicion to believe
8 a crime had been, was being, or was about to be committed by Franco when they determined that
9 he was driving a “cold-plated” vehicle, in violation of Nevada traffic laws. A cold-plated vehicle
10 is often used in the commission of crimes to avoid police detection or apprehension. It was,
11 therefore, clearly reasonable for the police to immediately detain Franco to investigate his per se
12 illegal operation of a motor vehicle and attempt to determine whether or not the vehicle was stolen
13 or Franco had been or was about to be involved in criminal activity.

14 When the defendant stepped out of the vehicle, he dropped a shaved key from his person,
15 which was another indication of a possibly stolen vehicle and a possible possession of burglary
16 tool under Nevada law. This justified his continued detention and provided probable cause for his
17 arrest independent of the traffic law violation. During the course of the investigation, an officer
18 noticed that the steering column of the vehicle had been damaged, another indication the vehicle
19 was possibly stolen. A records check indicated Franco had been previously convicted of a crime
20 involving a stolen automobile, and officers were aware that the vehicle Franco was driving, a 1996
21 Honda Accord, is a vehicle type that is frequently stolen. Although police determined the vehicle
22 had not been reported stolen, that did not necessarily mean that the vehicle had not been stolen, or
23 that Franco and/or Sarah rightfully possessed it.

24 The government disputes that immediately ordering Franco out of the vehicle turned his
25 original detention into a de facto arrest, or one that was constitutionally impermissible. The
26 government contends that the fact that Franco may have been immediately handcuffed when he
27 got out of the vehicle did not convert the investigatory detention into an arrest. The government
28 maintains that the investigation developed probable cause to arrest Franco for possession of the

1 firearm. Assuming arguendo that discovery of the firearm was the only basis for the arrest, which
2 the government disputes, “an arrest would only require the police to have sufficient cause to
3 believe that the Defendant was in actual or constructive possession of a firearm.” In this case, the
4 firearm was found inside a center console area of a vehicle Franco was driving. Based on the
5 location of the firearm in the vehicle, the fact that Sarah stated the firearm did not belong to her,
6 and the officers’ knowledge that Franco had previously been convicted on multiple occasions of
7 felonies involving possession of firearms, there was probable cause to arrest him for the offense
8 of felon in possession of a firearm.

9 Additionally, the government disputes that Franco has standing to challenge the search of
10 the vehicle. As the proponent of a motion to suppress, he has the burden of establishing that his
11 Fourth Amendment rights were violated by the challenged search or seizure and may not
12 vicariously assert violation of another person’s Fourth Amendment rights. In this case, Franco
13 does not contend that he was the owner of the vehicle, or that the firearm was located in a private
14 area of the vehicle where he had a legitimate expectation of privacy. Rather, he claims only that
15 he was driving a car with the permission of its lawful owner, Sarah, and thus had a reasonable
16 expectation of privacy in the car. The government argues Franco could not have a legitimate
17 expectation of privacy in an exposed center console area of a vehicle that is being operated illegally
18 on a public roadway with another individual inside the car. The motion does not claim that Sarah
19 allowed Franco to borrow the car and exclude anyone else from it while he was in possession, only
20 that Sarah asked him to drive her to the store in someone else’s vehicle. The motion does not
21 establish that Sarah was the rightful owner of the vehicle, or that Sarah was able to legitimately
22 give Franco permission to drive it in the first place.

23 Finally, the government argues that even if Franco has standing to challenge the search of
24 the vehicle, the search of the vehicle was lawful as an inventory search pursuant to LVMPD policy.
25 This is because police determined within minutes of the initial stop that the vehicle was going to
26 be impounded pursuant to LVMPD policy because it was cold-plated, the true license plates and
27 registration for the vehicle had been suspended, and the vehicle could not legally operate on public
28 roadways. Section 5/204.06(10) of the LVMPD policy manual allows for impoundment under

1 these circumstances. The government also maintains the police had a substantial basis to believe
2 the vehicle was stolen or not in the rightful possession of Franco and/or Sarah because: the vehicle
3 was cold-plated; the vehicle had a damaged steering column; Franco possessed a shaved key;
4 Franco had multiple prior felony convictions involving stolen vehicles and/or grand larceny; the
5 vehicle itself is one that is commonly stolen; Sarah had no proof of ownership of the vehicle; and
6 the registered owner of the vehicle lived in another state and was unable to be contacted after more
7 than one attempt. The vehicle was therefore subject to impoundment under Section 5/204.06(6)
8 of LVMPD's policy manual, which allows for an impoundment when ownership and rightful
9 possession by the driver is in doubt.

10 The government argues in the alternative, that if the court finds that the police "jumped the
11 gun" and began searching the vehicle before they actually decided to tow it, or had a reasonable
12 basis to tow it, the firearm would have been inevitably discovered. The inevitable discovery
13 doctrine is an exception to the exclusionary rule and permits admission of otherwise excluded
14 evidence if the government can prove that the evidence would have been obtained inevitably
15 regardless of any police overreaching. In this case, by following routine procedures, the police
16 would have inevitably uncovered the evidence. Here, it is more likely than not that by following
17 routine police procedure, the vehicle would have been lawfully impounded and inventoried, and
18 the firearm would have been discovered during the course of the inventory. The government
19 disputes that Sarah should have been permitted to drive the vehicle away, because it was unlawful
20 for the vehicle to be driven without a valid license plate when its true registration was suspended.

21 **C. Franco's Reply**

22 Franco's reply argues that the government's opposition makes a number of unsupported
23 representations. Franco's motion did not acknowledge that the vehicle's registration had been
24 suspended. Franco argues that, although officers indicated the license plate on the Honda Accord
25 was suspended, license plates can show up as suspended due to clerical errors with the DMV
26 database. Franco also disputes that officers saw a "shaved" key fall from Franco as he got out of
27 the car. Discovery provided by the government shows the officers found a shaved key on the
28 ground after Franco's arrest and after Officer Hager searched the car. The police property report

1 indicates police found the shaved key while executing the search warrant several hours later.
2 Additionally, no body camera footage produced to the defense shows any officers seeing,
3 identifying, or discussing the “shaved” key.

4 The reply also points out that none of the police reports produced in discovery support the
5 government’s claim that, while obtaining the VIN, an officer noticed the steering column had been
6 tampered with, and the center console was missing the stereo component. Officer Hager’s body
7 camera shows he obtained the VIN from outside of the Honda and walked away. Three minutes
8 later, Hager walked back to the Honda, opened the door, and began rummaging through the car’s
9 contents. Within seconds of being stopped, Franco told officers he had no knowledge about the
10 fictitious plates on the vehicle, and that he was giving a ride to his friend, Sarah, who was inside
11 of the Wal-Mart. The reply argues that the government’s opposition contains post-arrest details
12 about a jail call and Franco’s DNA not relevant to the motion to suppress. An unlawful search
13 may not be validated by what it turns up. The reply also reiterates arguments that police unlawfully
14 seized Franco without reasonable suspicion and made a de facto arrest without probable cause.
15 The court must determine the collective knowledge of the officers at the time of the seizure, not
16 whether officers eventually had sufficient collective knowledge to make an arrest.

17 Franco disputes that the officers had reasonable suspicion to stop Franco for a fictitious
18 plates violation under Nevada law. Assuming the plates were “fictitious,” Subsection 1 requires
19 the car to be operated upon a highway. Here, the vehicle was stopped in a Wal-Mart parking lot.
20 Additionally, Subsections 2 and 6 of NRS 482.545 require a “knowing” element about the
21 fictitious plates. Franco consistently denied he knew the plates were fictitious, and Sarah admitted
22 she placed the plates on the car to avoid being stopped.

23 Courts examine the totality of the circumstances in deciding whether an investigative
24 detention has ripened into arrest, focusing on the perspective of the person seized, rather than the
25 subjective beliefs of law enforcement officers. In this case the officers conducted a de facto arrest
26 by laying Mr. Franco over the hood of the patrol car, handcuffing him, and searching under his
27 clothes. This was done within seconds of the stop. A reasonable innocent person in Franco’s
28 position would understand that he was under arrest.

1 Thy reply acknowledges that Franco must have standing to challenge the search of the
2 vehicle. However, citing *United States v. Caymen*, 404 F.3d 1196, 1199 (9th Cir. 2005), Franco
3 argues that an individual's conduct may establish a subjective expectation of privacy that society
4 is prepared to accept as reasonable. A driver who does not own a car may exhibit an objectively
5 reasonable expectation of privacy sufficient to establish standing. The reply cites *United States v.*
6 *Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980) for the proposition that a non-owner who has both
7 the permission to use a friend's automobile and the keys to the ignition and trunk, with which he
8 could exclude all others except his friend, possesses the requisite legitimate expectation of privacy
9 necessary to challenge a search of the car. The right to exclude others is a factor for the court to
10 consider, but "it is neither exclusive nor determinative standing alone." Franco cites *United States*
11 *v. Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006), for the proposition that even an unauthorized
12 driver can have a possessory or ownership interest sufficient to challenge an unlawful search of a
13 car. In this case, Franco had both the permission to use his friend's automobile and the keys to the
14 ignition and trunk. Thus, he had the requisite legitimate expectation of privacy necessary to
15 challenge the propriety of the search of the Honda Accord.

16 The reply also reiterates arguments that, at the time Officer Hager conducted a search of
17 the vehicle, there was no community caretaking function that justified an impound of the vehicle.
18 An inventory search cannot be used as ruse for general rummaging to discover incriminating
19 evidence. Police may only impound and search a vehicle under the "community caretaking"
20 doctrine: (1) in furtherance of a community caretaking purpose such as promoting public safety
21 and efficient flow of traffic, and (2) in conformance with the standardized procedures of the local
22 police department. A decision to impound a vehicle that is not consistent with law enforcement's
23 role as "caretaker of the streets" is unreasonable. Neither of the two justifications articulated by
24 the government for this impoundment satisfy the standard. The Honda Accord was lawfully
25 parked in the parking lot of Wal-Mart. The car was not impeding traffic or threatening public
26 safety or convenience where it was parked. Therefore, government cannot prove the impoundment
27 was done pursuant to LVMPD policy.

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1 LVMPD policy 5/204.06(10) states that an impoundment may be proper “[i]n other
2 circumstances, in accordance with the prescribed authority and conditions defined in the Las Vegas
3 City Code, Clark County Ordinances, and Nevada Revised Statutes.” However, the government
4 points to no authority under Las Vegas City Code, Clark County Ordinances, or Nevada Revised
5 Statutes that would authorize the police tow on this vehicle from private property. Similarly, the
6 government cannot rely on LVMPD policy 5/204.06(6) that authorizes an impound when
7 ownership and rightful possession by the driver is in doubt. At the time of the search in this case,
8 there was no doubt about Franco’s identity, and Franco’s statements about the car’s owner and her
9 whereabouts. If police doubted his statements, their doubts could not justify an impound within
10 minutes of the stop because the police were still running the VIN and trying to determine who the
11 registered owner was. Here, Officer Hager began to search the vehicle before the officers knew
12 anything about the car’s license and registration. At the time Hager opened the passenger side of
13 the vehicle, police knew only that the car’s plates showed “no return,” Franco had felony priors in
14 the past, and the owner was inside the Wal-Mart and would soon return. Police had no information
15 about the damaged steering column, any shaved keys, that Sarah had no proof of ownership of the
16 vehicle, or that the registered owner of the vehicle lived in another state and was unable to be
17 contacted. No attempt had been made to contact the registered owner. In short, Franco argues that
18 the government cannot use later-learned facts to justify Officer Hager’s search, and that the
19 impound search exception was not justified under the Fourth Amendment.

20 Franco also maintains that the police unreasonably ignored information that dissipated
21 probable cause for Franco’s continued arrest. Citing *United States v. Lopez*, 482 F.3d 1067, 1073
22 (9th Cir. 2007), Franco argues that although the police may initially have had probable cause to
23 justify an arrest, if additional information obtained at the scene indicates there is less than a fair
24 probability that the defendant has committed or is committing an offense, the continued arrest of
25 the person is illegal. Police may not disregard facts tending to dissipate probable cause. In this
26 case, within five minutes of the search, police learned information that dissipated probable cause
27 that Franco had committed any crime because minutes after searching the car and finding the gun,
28 officers knew the car was not stolen. Additionally, Ms. West emerged from the Wal-Mart and

1 admitted to “cold plating” the car to avoid being stopped. Police became aware that the registered
2 owner of the car had a concealed weapon permit and had recently possessed the car. Franco was
3 cooperative with officers and followed their orders. Franco truthfully identified himself and
4 answered the officer’s questions. Ms. West confirmed the veracity of Mr. Franco’s statement.
5 Franco denied knowledge about “cold plating” and denied knowledge about the gun. Despite all
6 of these facts, which dissipated probable cause, officers continued to keep Franco under arrest in
7 violation of his Fourth Amendment rights.

8 Finally, the reply reiterates arguments that because the impoundment was not justified, the
9 inevitable discovery doctrine does not apply. In this case, Officer Hager opened the door and
10 began searching its contents before police had even determined the identity of the car’s registered
11 owner. The only reason finding the firearm was inevitable was because the officer took a shortcut.
12 Shortcuts do not justify unlawful searches, and later-learned facts do not justify a search unlawful
13 from its inception. The police violated Franco’s constitutional rights and as a result, the bullets,
14 gun, and Franco’s DNA should all be suppressed as the fruit of an unlawful seizure and search.

15 **III. Testimony at the Evidentiary Hearing**

16 **A. Officer Michael Donovan**

17 Officer Donovan has been employed by LVMPD for almost nine years and works patrol.
18 On June 7, 2016, he was on duty with Officer Abel in the northwest area command near Lake
19 Mead and Jones. Abel was working on another call. Donovan observed an older model Honda
20 driving northbound on Lake Mead. Donovan used binoculars to observe the license plate on the
21 vehicle. Older model Hondas are vehicles that are easily and frequently stolen. He ran the license
22 plate, which “didn’t come back to anything.” He reviewed his police report and refreshed his
23 recollection that the license plates on the vehicle were Nevada plates. A no return report indicates
24 there was no information on the plates, they were old, or the vehicle was “cold-plated.” He decided
25 to go after the vehicle and investigate. The fact that the license plate on the vehicle was a “no
26 return” heightened his suspicion that the car may be stolen because cold-plating is a common tactic
27 used to steal vehicles. The Honda pulled into the Wal-Mart parking lot. The officers got behind
28 it and initiated a traffic stop in the parking stall in the Wal-Mart parking lot. Donovan reported

1 the call on his radio as a cold-plated vehicle. As soon as the officers got there, Franco got out of
2 the vehicle. He was ordered back into the vehicle, and then ordered out. Donovan placed him in
3 handcuffs and set him on the curb. Donovan identified the driver of the vehicle as Defendant
4 Franco in open court. As Franco got out of the vehicle, a small metal object fell out, which looked
5 like a makeshift key or shaved key with tape wrapped around it. This was another indication the
6 Honda may be a stolen vehicle.

7 Officer Abel stayed with Franco while Donovan did a safety sweep of the vehicle to see if
8 anyone else was in the vehicle. During the sweep he observed the shaved key on the floor. The
9 driver was identified and a records check was conducted. The records indicated Franco had prior
10 felony convictions for weapons offenses and possession of a stolen vehicle, which contributed to
11 Donovan's suspicion a crime had occurred. Donovan testified this is your "basic stolen vehicle"
12 scenario. He observed a shaved key, an older model Honda which is a frequently stolen vehicle,
13 a suspect with priors for possession of stolen vehicle, and a cold-plated vehicle. Donovan went to
14 get the VIN to gather further information to determine whether the vehicle was stolen. He looked
15 inside the car while obtaining the VIN and saw that the steering column looked like it had been
16 tampered with, which is another common way to steal a vehicle. The registration on the vehicle
17 was not current. The registered owner, Thomas Alley, was out of Arizona. A female came out of
18 the Wal-Mart and said she was the owner. The female, Sarah, said Thomas Alley was her father
19 and gave the officers her father's number. She also stated that the officers could find proof she
20 owned the vehicle from paperwork in her house. Donovan sent another officer to her house to
21 attempt to locate the paperwork.

22 The decision was made to tow the vehicle because officers believed it was likely stolen,
23 and "we weren't going to leave it in the parking lot." Exhibit 1, LVMPD's vehicle impound policy,
24 was admitted. The policy allows a vehicle to be impounded when the ownership or rightful
25 possession of a vehicle is in doubt. The ownership and rightful possession of this vehicle was in
26 doubt because the vehicle was cold-plated, the ignition had been tampered with, shaved keys were
27 observed, and Franco had priors for possession of a stolen vehicle. The police attempted to contact
28 the registered owner without success.

1 Exhibit 2 was admitted. It is the vehicle impound report for this case. A shaved key is a
2 possible burglary tool. A copy of the Nevada Revised Statute ("NRS") prohibiting possession of
3 burglary tools was admitted in evidence as Exhibit 3. Exhibit 4 was admitted in evidence. It is
4 the NRS statute prohibiting driving with fictitious or false plates.

5 Donovan believed he had probable cause to arrest Franco for possession of burglary tools
6 and for driving a vehicle with false and fictitious plates. Donovan did not participate in the
7 inventory of the vehicle. However, outside the vehicle he observed the steering column had been
8 tampered with. He also saw that in the area of the center console there was a cavity where a stereo
9 would normally be.

10 Vehicles are routinely towed by LVMPD officers when they are cold-plated and not in the
11 custody of the registered owner. The fact that the registered owner was out of state made it more
12 difficult to contact him. Officers need to use teletypes to obtain information from another
13 jurisdiction which is one of the reasons the vehicle is typically towed.

14 The "CAD" (computer assisted dispatch) log was admitted as Exhibit 5. It relates that at
15 10:57:46, an officer went to Sarah's address to attempt to verify her claim of ownership. A later
16 entry establishes officers tried to reach the registered owner in Arizona. The registered owner was
17 not reached and the vehicle was ultimately impounded. The decision that the vehicle might be
18 stolen and should be towed was made within the first 15 minutes of the stop. The registered owner
19 was out of state and "all other elements present" made Donovan suspicious the vehicle was stolen.

20 On cross-examination, Donovan testified that, at the time of the stop, he had been patrolling
21 the northwest area command for approximately six months. He and Abel were on another stop
22 when Donovan first saw the vehicle through binoculars. He did not notice anyone in the vehicle
23 other than the driver. Abel was having a conversation with two people in the shade when Donovan
24 made his observations. Donovan ran the vehicle after seeing plates through the binoculars. The
25 vehicle was a mid-90s Honda; which in and of itself was not suspicious. However, the records
26 check came back as a "no return." He and Abel finished the other stop. Donovan never lost sight
27 of the Honda and followed it into the Wal-Mart parking lot. Donovan did not have any other
28 information the vehicle was stolen, had warrants, or information on the driver. Donovan did not

1 observe any other traffic violations other than the cold plates on the vehicle. Donovan also found
2 it suspicious that the driver pulled around three places in the parking lot before parking. The police
3 report refers to the vehicle driving between parking spots.

4 Wal-Mart is a private parking lot and the driver pulled into a parking spot. Defendant's
5 Exhibit A was admitted. It is a picture of the patrol vehicle and the Honda officers pulled over.
6 The vehicle was not impeding traffic or threatening public safety.

7 As Franco got out, Donovan saw something fall from his person. Officer Abel was wearing
8 a body-cam. Exhibit G, Abel's body-cam video, was admitted in evidence. Portions of the body-
9 cam video were played in open court. Officers initially told Franco to stay in the car and then
10 ordered him out. Donovan acknowledged that the video did not depict something falling from
11 Franco's person. Donovan described himself as "active" and trying to stay with Abel. The video
12 depicts Franco with a cigarette. Donovan remembered seeing something metal fall from Franco,
13 but wasn't initially suspicious when he saw the item fall.

14 The stop was called in as a possible stolen vehicle, Code 411. Donovan did not go inside
15 the vehicle, but made observations in plain view. He obtained the VIN number and observed the
16 steering column. Donovan did not recall if he told Abel about seeing the shaved key, but told
17 everyone about it over the radio. It is likely he would have told Abel about his observations about
18 a shaved key and his steering column observations. He broadcast a suspicious and likely stolen
19 vehicle, but did not broadcast anything about a shaved key and the steering column over the air.
20 He recovered the shaved key. He did not recall when, but testified it was probably before the
21 vehicle inventory.

22 Exhibit B is the property report for the stop that Abel prepared. It notes that shaved keys
23 were on a ring and a bent piece of metal with black tape was recovered from the Honda.

24 The gun was found in the execution of the search warrant. The CAD report indicates the
25 tow truck arrived at 2:20 p.m. Donovan was the officer who applied for the search warrant. The
26 telephonic search warrant the officer obtained was marked and admitted as Exhibit F. Donovan
27 applied for the search warrant at 1:40 p.m.

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1 Donovan described Franco as cooperative. Abel initially commanded that Franco remain
2 in the vehicle, then ordered him out. Franco was cooperative with Abel's command to show hands
3 and placed his hands on the vehicle. Franco asked what was happening. Donovan could not recall
4 whether Franco said the owner of the vehicle was in the Wal-Mart. Donovan did not recall who
5 ran the VIN number on the computer, only that the VIN was obtained and it was done. The CAD
6 report shows Officer Hager arrived at the scene approximately 10 minutes after the stop. Donovan
7 and Abel were both doing what they could to identify the registered owner of the vehicle. Officers
8 learned that the vehicle was not reported stolen approximately 11 minutes after the stop. Officer
9 Abel tried to contact the registered owner, but was not able to do so.

10 Page 4 of Exhibit F, the application for the search warrant, indicates officers had gone
11 inside the vehicle. The search warrant was sought to retrieve the gun. Donovan told the judge that
12 Officer Abel had contacted Thomas Alley who told Abel that Sarah was permitted to have the car.
13 Donovan could not recall how Abel was able to contact Thomas Alley in Arizona. He thought it
14 was a "cop-to-cop favor." Sarah had something at her residence to show ownership of the vehicle.
15 Donovan could not recall his conversation with Sarah. Specifically, he did not recall Sarah saying
16 she cold-plated the vehicle, or that Franco had permission to use it.

17 When Donovan conducted a sweep of the vehicle, he did not go inside, he just looked
18 inside for a person. Donovan could not recall whether he confronted Sarah about finding a gun in
19 the car, or whether Sarah denied knowing about it.

20 Donovan reiterated that it is very rare when officers do not tow a cold-plated car. He found
21 it suspicious that Franco had priors and, under the totality of the circumstances, decided the vehicle
22 should be towed.

23 On redirect, Donovan testified that he ran the plates on the Honda at the beginning of the
24 stop because the year and make of the car is a frequently stolen vehicle, and it was observed driving
25 in an area where there are a lot of stolen vehicles. The CAD report shows an entry at 10:35:59
26 that officers were on a possible 411, stolen vehicle call, and "key is stripped in the ignition."
27 Franco stated the owner of the vehicle was in Wal-Mart. Donovan had no reason to believe Franco
28 as he had not seen anyone in the vehicle before the stop. The fact that the vehicle was not reported

1 stolen did not mean that it wasn't stolen. Cold-plated cars are almost always towed because cold
2 plates are placed on vehicles to hide stolen plates unless an owner takes off the plates on one
3 vehicle and puts them on another. LVMPD policy authorizes tows of cold-plated vehicles.

4 In response to questions by the court, Donovan testified that he had authority to make an
5 arrest for driving a cold-plated vehicle or a vehicle with fictitious license plates. However, in
6 response to defense questioning, he acknowledged that he did not arrest Franco or Sarah for a cold
7 plate violation. Cold-plated vehicles are almost always towed, even in a private parking lot. The
8 vehicle could not have been left there because it would have violated policy.

9 **B. Officer John Abel**

10 Abel has been employed by LVMPD for 10 years. On June 7, 2016, he was on another
11 call with Officer Donovan at approximately 10:35 a.m., in the area of Lake Mead and Jones.
12 Donovan observed a Honda driving westbound on Lake Mead while Abel was on another stop
13 across the street. Donovan was using binoculars when he observed the Honda, and ran the plates
14 finding the plates did not come back to the vehicle. The officers went to make a stop. As soon as
15 the patrol car pulled behind the vehicle in the parking lot, the driver immediately got out. He was
16 taken into custody. Older model Hondas are stolen "a bunch." The plate was considered a cold
17 plate. In that area of town, there is a high probability that a car will come up stolen. When the
18 driver got out of the car, Abel saw something fall out of his lap. He checked and observed a shaved
19 key. A VIN check was done that indicated the vehicle was not reported stolen. The registered
20 owner was an older gentleman whose name Abel could not recall. The vehicle was registered in
21 Arizona. A records check of the driver, Defendant Franco, indicated he had a criminal history for
22 grand larceny auto or possession of stolen vehicle.

23 Abel attempted to contact the registered owner of the vehicle. Franco was placed into
24 custody and read *Miranda* warnings. Franco stated that the car belonged to a female, Sarah, that
25 he had dropped off. Sarah came out of the Wal-Mart within a few minutes and stated the car
26 belonged to her dad. Sarah also stated she placed plates that didn't belong on the vehicle because
27 she could not afford to have it registered. Portions of Abel's body-cam video were played in open
28 court. Approximately 12:22 minutes into the stop, Sarah is heard stating her dad's name is Tom.

1 Abel told Sarah he was “not looking at you” and requested that Sarah call her father. Sarah
2 attempted to reach her father on the phone, and stated he was not answering. Abel asked Sarah
3 why she was crying. At 25 minutes into the stop, Abel left a message for Mr. Alley indicating he
4 was calling about a Honda and attempting to verify ownership. Abel was attempting to reach the
5 registered owner because he did not know whether Sarah had the right to possess it. Abel could
6 not recall Sarah saying the vehicle had been stolen before. However, when the video was played,
7 it refreshed his recollection. Sarah stated she knew Franco from her brother, and that he was a
8 friend.

9 The decision was made to tow the vehicle. Abel did not recall who did the impound report.
10 Abel observed a firearm in the center console during completion of the inventory.

11 On cross-examination, Abel testified that at the time of the stop, he only knew the car was
12 cold-plated. There was nothing suspicious about the driver, and he did not know anything about
13 the driver. Abel lost sight of the driver before the stop. The driver could have dropped off a
14 passenger. Abel did not recall if the officers activated their lights to make the stop. The car was
15 not obstructing traffic in the parking lot. As Abel was getting out of the patrol car, the driver was
16 already getting out. Franco was compliant for the most part. He was immediately placed in
17 handcuffs. During a pat down, Abel went into Franco’s right pocket and pulled out a wallet. He
18 also went into the left pocket. After obtaining Franco’s identification, Abel did a records check
19 and learned that Franco had felony convictions.

20 Several officers arrived at the scene including Officers Ostrovsky and Hager. The body-
21 cam video shows that 7:45 minutes into the stop, Hager got the VIN from the car. At this point,
22 Abel had not been to the vehicle. However, he knew something fell from Franco as he got out of
23 the car. It was a long piece of metal with a piece of tape on it. Abel did not pick the item up
24 because he was focused on Franco. He did not recall whether Franco had a cigarette. The decision
25 to tow the vehicle was pretty much made after the stop. From the VIN, officers figured out that
26 the car did not belong to Franco, and that it was cold plated. The body-cam video shows that
27 between 10 and 11 minutes into the stop, officers determined the car was not registered in
28 California. An officer states “try Arizona” and a report came back that the car was from Arizona

1 and had suspended plates. However, the report was negative for a stolen vehicle. Eleven minutes
2 after the stop, Officer Hager is observed inside the Honda while Donovan is at the front of the
3 patrol car. Abel did not ask Hager to go inside the vehicle.

4 The registration came back to Thomas Alley. Even though officers learned the vehicle was
5 not reported stolen, this does not mean the vehicle was not stolen. Abel learned that Hager found
6 rounds and then a gun inside the vehicle. Then Abel went to the Honda and Hager showed him
7 where the gun was. A little after 13 minutes into the stop, the gun was discovered. The gun was
8 inside a holster, inside the center console area where the radio used to be. When asked whether
9 the gun was hidden, Abel responded it was not in plain view, and that someone would have to be
10 in the car to see where it was.

11 Abel talked to the female who approached the car separate from Franco and told her
12 officers found a gun in the car. Abel did not recall whether Sarah indicated she had title to the
13 vehicle at home, but saw a CAD printout indicating an officer was sent to a residence to attempt
14 to locate the title. Approximately 15 minutes after the stop, Sarah is heard on the video stating
15 that the car is hers, rather her father's, Thomas Alley, which was consistent with the information
16 received concerning the registered owner. Sarah attempted to reach her father and Abel left a
17 message on her father's voicemail. At some point, Abel had a conversation with Mr. Alley "after
18 it was all said and done." Sarah said she was in the vehicle and Franco had dropped her off.

19 After the gun was found the vehicle was "frozen" and officers waited for a search warrant.
20 Then Abel did an inventory of the vehicle. The inventory report reflects that clothing was found.
21 He did not recall whether it was male or female clothing.

22 Franco was not arrested for the cold plate violation because officers are not permitted to
23 stack charges.

24 Abel recalled someone saying that Thomas Alley owned firearms. Abel probably ran Alley
25 and found he had a concealed weapons permit. Franco adamantly denied the gun belonged to him.
26 Franco called Sarah a "square." This prompted Abel to tell Sarah that "if the gun was hers, fine,"
27 to give her the opportunity to say the gun was hers. Although a records check indicated she had a
28 prior for battery, she could still lawfully own a firearm.

1 Abel believed that Hager stated the bullets were found on the floorboard of the vehicle in
2 a purple baggie. Sarah's purse was searched. A second disk of the body-cam video was marked
3 and admitted as Exhibit H. The video shows that Sarah's purse was searched and a purple bag
4 was retrieved from it. One of the officers made a comment "there's another one." There were two
5 purple bags found, one on the floorboard and one in Sarah's purse.

6 Anytime there is a question about ownership of a vehicle, it is inventoried. Here, the
7 registered owner was not at the stop, the vehicle was cold plated, and officers could not confirm
8 whether it was stolen or not. The tow was requested about four hours after the initial stop. Abel
9 acknowledged that Exhibit 2, the impound report, was left blank in the portion of the form asking
10 for the reason for the impound. Abel testified that this was a mistake and he simply forgot to mark
11 the form. Had he done so, he would have said the impound occurred because the driver was
12 arrested. Abel testified the officers could not have left the vehicle parked in the parking lot because
13 there was still a question about whether it was actually reported stolen. A car does not need to be
14 obstructing traffic to be towed.

15 Sarah walking out changed things. However, the officers still had to confirm the vehicle
16 was not stolen. The decision to impound the vehicle "could have been undone" if everything had
17 checked out.

18 On redirect, Abel testified that Nevada law authorizes an arrest for operating a vehicle with
19 cold plates. Abel knew the driver was driving a cold-plated vehicle before he made contact with
20 Franco. Abel could have seen the firearm if he sat in the driver's seat of the vehicle. The body-
21 cam video indicates officers learned Franco was a "10-time felon." Donovan's report reflects
22 Franco's prior convictions included felon in possession of a firearm, which also added to probable
23 cause for Franco's arrest.

24 **C. Officer David Hager**

25 Hager testified that he was involved in the investigation of a cold-plated, possibly stolen
26 vehicle in this case. He testified on direct that he was informed a suspect was at the scene and was
27 a 10-time convicted felon. He was wearing a body-cam, and his body-cam video was admitted as

28 ///

1 defendant's Exhibit I.¹ 27:35 minutes into his body-cam video, a woman is heard asking why
2 police thought the vehicle was stolen. Hager responded, "because the key is shaved and that's not
3 normal. Parked cars don't normally have center consoles missing, and this car looks like it's
4 stolen." Hager was the officer who went into the vehicle and observed the firearm. He did not
5 recall if an inventory search was done by another officer.

6 On cross-examination, Hager testified he arrived in the Wal-Mart parking lot after patrol
7 was already there. The officers making the stop were trying to figure out what the deal was with
8 the car and suspected it was cold plated. The VIN had not yet been run. Officer Abel asked Hager
9 to check the VIN number. Franco was asked if he had any paperwork in the vehicle that might
10 help. Portions of the video were played, and at 6:20 into Hager's body-cam video, Hager is heard
11 asking where the female who owned the vehicle was at, and Franco responded that she was in the
12 Wal-Mart. At 7:02 into the body-cam, Hager entered the vehicle. He stated it was to find
13 paperwork on the car because he had been told the female owned the car. At 7:22 on the body-
14 cam, Hager picked up a purple baggie. Hager acknowledged he was not looking for paperwork
15 concerning ownership of the vehicle, "just searching." He opened the bag finding bullets and
16 asked Franco where the gun was. At 8:29 on Hager's body-cam shows Hager had moved from the
17 passenger side to the driver's side of the vehicle and was looking under the driver's side seat.
18 Hager testified he was trying to adjust the seat and was looking for a gun for officer safety. At
19 9:42 on Hager's body-cam, Hager is seen on the passenger side and heard stating "hey bro, 413
20 right in the center." The gun was found right in the middle of the empty console area.

21 On re-direct, Hager testified that a 413 is code for a gun. It was found right in the middle
22 of the vehicle, not hard to find, and he "didn't have to dig" to find it.

23 **D. Sarah Alley West**

24 At the conclusion of Officer Hager's testimony, the government rested. The defense called
25 Sarah Alley West. Ms. West testified that on June 7, 2016, she was with Thomas Franco. She
26 knew Franco and regarded him as a friend or an acquaintance she met through her brother-in-law.

27 _____
28 ¹ Throughout his testimony, Hager was reluctant to answer questions without first reviewing the video footage, and repeatedly asked to have the video played before he answered questions on cross examination.

1 They were together that day in her car. Franco was the driver. She gave Franco permission to
2 drive. Sarah testified that the car is titled in her father's name, but that it was her vehicle. Her
3 father is Thomas Alley. The vehicle she owned was a 1996 Honda Accord. The vehicle was in
4 her father's name because she was going through a divorce and did not want her husband to get
5 the car in the divorce. Exhibit A is a photograph of her Honda.

6 Before traveling to the Wal-Mart, the vehicle had been sitting in the driveway unlocked.
7 She could not recall if Franco had clothing or a backpack inside the vehicle. It was possible, but
8 she did not recall. When shown Exhibit D, a photo of the interior contents of the Honda, and asked
9 whether the backpack was hers, she testified that it was not her backpack and was "possibly his."
10 The clothing shown in the picture is not hers.

11 On June 7, 2016, she told officers that it was her vehicle. She believed that the officers
12 had her call her father. At the time of her testimony, she was in custody for a matter unrelated to
13 this traffic stop. She was arrested about a month later on another charge.

14 On cross-examination, West testified that she was in custody on a probation violation. She
15 was serving months on her first possession of burglary tools and possession of false identification
16 documents in July. She acknowledged that possession of false identification documents is a crime
17 involving dishonesty.

18 Ms. West bought the car off of Craig's List and had it for approximately eight to nine
19 months before this stop. The registered owner was her father. Her father was the registered owner
20 because she did not want to lose the car in her divorce. She admitted that she cold plated the
21 vehicle. She testified that she put fake plates on the car because she didn't have a plate for the
22 vehicle. On June 7, 2016, she was going to the Wal-Mart from her house. Franco was driving
23 because he complained when she drove. When asked whether she ever told Franco he had the
24 right to prevent others from accessing the vehicle, West paused and ultimately said, "yeah." At
25 first, Sarah testified that Franco did not have permission to store things in her vehicle. However,
26 she testified "he could have his stuff" in the vehicle. It wasn't discussed. She recalled that the
27 center console area of the vehicle was missing the stereo. During the stop she learned that a gun
28 had been recovered.

1 On re-direct, Sarah testified this was not the first time that Franco had driven or used the
2 car. He had used the car “a lot” before this stop.

3 At the conclusion of Ms. West’s testimony, the defense rested. The court canvassed Mr.
4 Franco about whether he understood that he had the right to testify or not at the evidentiary hearing.
5 Franco confirmed that he had discussed the matter with his counsel, understood that he had the
6 right to testify or not, and that after conferring with counsel, it was his decision not to testify.

7 DISCUSSION

8 The Fourth Amendment secures “the right of the people to be secure in their persons,
9 houses, papers, and effects against unreasonable searches and seizures.” U.S. Const. amend. IV.
10 The Fourth Amendment protects reasonable and legitimate expectations of privacy. *Katz v. United*
11 *States*, 389 U.S. 347, 350–51 (1967). The Fourth Amendment protects “people, not places.” *Id.*
12 at 351. Evidence obtained in violation of the Fourth Amendment, and evidence derived from it
13 may be suppressed as the “fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471,
14 484–87 (1963); *United States v. Lundin*, 817 F.3d 1151, 1157 (9th Cir. 2016); *United States v.*
15 *McClendon*, 713 F.3d 1211, 1215 (9th Cir. 2013) (“Searches and seizures that offend the Fourth
16 Amendment are unlawful and evidence obtained as a direct or indirect result of such invasions is
17 considered ‘fruit of the poisonous tree’ and is inadmissible under the exclusionary rule.”) (citing
18 *Wong Sun*, 371 U.S. at 484–87).

19 **I. Standing or Capacity to Challenge a Search**

20 Fourth Amendment rights are personal rights and may not be vicariously asserted. *Rakas*
21 *v. Illinois*, 439 U.S. 128, 133–34 (1978); *United States v. Wei Seng Phua*, 100 F. Supp. 3d 1040,
22 1055 (D. Nev. 2015). When a person has no ownership interest in the place or thing searched, he
23 must have a reasonable expectation of privacy to claim a violation of his Fourth Amendment rights.
24 *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1187 (9th Cir. 2015) (finding that five people who did
25 not assert ownership interests in the places searched were forced to rely on *Katz*’s reasonable
26 expectation of privacy framework).

27 In *Rakas*, the Supreme Court rejected the notion that “any criminal defendant at whom a
28 search was ‘directed’ would have standing to contest the legality of that search and object to the

1 admission at trial of evidence obtained as a result of the search.” *Id.* at 132–33. Rather, the
2 “capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person
3 who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded
4 place.” *Id.* at 143. A person charged with a possessory offense has no “automatic standing” to
5 claim protection under the Fourth Amendment. *United States v. Salvucci*, 448 U.S. 83, 85 (1980)
6 (overruling *Jones v. United States*, 362 U.S. 257 (1960), and holding “defendants charged with
7 crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth
8 Amendment rights have in fact been violated”).

9 The Supreme Court has enunciated a two-part test to determine whether an expectation of
10 privacy is reasonable and legitimate. *Katz*, 389 U.S. at 361. First, the individual must have an
11 actual subjective expectation of privacy, and second, society must recognize that expectation as
12 objectively reasonable. *Id.* To say a defendant lacks Fourth Amendment standing is to say that
13 “his reasonable expectation of privacy has not been infringed.” *United States v. SDI Future*
14 *Health, Inc.*, 568 F.3d 684, 695 (9th Cir. 2009) (citing *United States v. Taketa*, 923 F.2d 665, 669
15 (9th Cir. 1991)). The defendant bears the burden of establishing, under the totality of the
16 circumstances, that the search violated his legitimate expectation of privacy in the place searched
17 or the things seized. *Rakas*, 439 U.S. at 143; *United States v. Davis*, 332 F.3d 1163, 1167 (9th Cir.
18 2003).

19 The Ninth Circuit has recognized a non-exhaustive list of factors generally relevant in
20 determining standing: (1) whether the defendant has a property or possessory interest in the thing
21 seized or the place searched; (2) whether he has the right to exclude others from the place searched
22 or items seized; (3) whether he has shown a subjective expectation in privacy that it would remain
23 free from governmental intrusion; (4) whether he took normal precautions to maintain privacy;
24 and (5) whether he was legitimately on the searched premises or legitimately in possession of the
25 thing seized. *United States v. Lopez-Cruz*, 730 F.3d 803, 807 (9th Cir. 2013) (citing *United States*
26 *v. Finley*, 477 F.3d 250, 258–59 (5th Cir. 2007)). A defendant’s failure to allege ownership of
27 items seized is a factor to be considered in determining whether he had a reasonable expectation
28 of privacy, but cannot, by itself, defeat standing to challenge a search. *United States v. Sarkisian*,

1 197 F 3d 966, 987 (9th Cir. 1999). A possessory or ownership interest sufficient to create a
 2 reasonable expectation of privacy may be shown by understandings that are recognized and
 3 permitted by society. *United States v Thomas*, 447 F 3d 1191, 1198 (9th Cir. 2006). A defendant
 4 who lacks an ownership interest has standing to contest a search of a friend's car if he shows "joint
 5 control" or "common authority." *Id.* A non-owner driver of a privately owned car has standing to
 6 challenge a search where he has permission to use a friend's automobile, keys to the ignition and
 7 the trunk, and the ability to exclude all others except the owner. *United States v. Portillo*, 633 F.2d
 8 1313, 1317 (9th Cir. 1980).

9 Here, it is undisputed that Franco was a non-owner driver of the 1996 Honda Accord at the
 10 time of the traffic stop. Sarah testified that she was the owner of the vehicle and frequently gave
 11 Franco permission to drive it. On the date of his arrest, Franco drove West to the Wal-Mart store.
 12 West testified that Franco drove when they were together because he complained when she drove.
 13 He remained in the car while she went inside the Wal-Mart. Franco was in possession of the
 14 vehicle itself, had keys to the vehicle, was authorized to drive it, and was authorized to "keep his
 15 stuff" in it. Franco had the right to keep others from the car, except for West, and was legitimately
 16 in possession of the car. The gun was found in the center console area where the stereo used to
 17 be. It was not in plain view, indicating that Franco took normal precautions to maintain privacy.
 18 Under these circumstances the court finds Franco has met his burden of establishing he had a
 19 reasonable and legitimate expectation of privacy in the vehicle and its contents. Franco therefore
 20 has standing to challenge the search of the vehicle.

21 **II. The Traffic Stop**

22 The motion to suppress argues Franco was seized in a traffic stop while parked in the Wal-
 23 Mart parking lot without reasonable suspicion. A temporary detention of an individual during a
 24 traffic stop constitutes a seizure within the meaning of the Fourth Amendment. *Whren v. United*
 25 *States*, 517 U.S. 806, 809–10 (1996). Because a traffic stop for a suspected violation of law is a
 26 seizure of the vehicle's occupants, it "must be conducted in accordance with the Fourth
 27 Amendment." *Heien v. North Carolina*, --- U.S. ----, 135 S. Ct. 530, 536 (2014).

28 ///

1 The Fourth Amendment requires only reasonable suspicion to justify a traffic stop. *Id.*; see
 2 also *United States v. Lopez-Soto*, 205 F.3d 1101, 1104 (9th Cir. 2000). Reasonable suspicion is
 3 defined as “a particularized and objective basis for suspecting the particular person stopped of
 4 breaking the law.” *Id.* (citing *Prado Navarette v. California*, --- U.S. ----, 134 S. Ct. 1683, 1687–
 5 88 (2014)). The reasonable suspicion standard takes into account the totality of the circumstances.
 6 *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc); see also *United*
 7 *States v. Cortez*, 449 U.S. 411, 417 (1981) (“the whole picture”). This standard requires
 8 “considerably less than proof of wrongdoing by a preponderance of the evidence,” and “obviously
 9 less” than is necessary for probable cause. *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

10 As long as there is an objectively reasonable basis to perform a traffic stop, the stop will
 11 be permitted by the Fourth Amendment. *Whren*, 517 U.S. at 813. Subjective intentions play no
 12 role in ordinary Fourth Amendment analysis. *Id.* The Supreme Court has been “unwilling to
 13 entertain Fourth Amendment challenges based on the actual motivations of individual officers.”
 14 *Id.* In *Whren*, a unanimous Supreme Court held that a traffic stop was reasonable under the Fourth
 15 Amendment where officers had probable cause to believe a traffic violation occurred, even if the
 16 ultimate charge was not related to the traffic stop. *Id.* at 808–09. As the Ninth Circuit has
 17 articulated its understanding of *Whren*, if officers have reasonable suspicion to conduct a traffic
 18 stop, it does not offend the Fourth Amendment even if the stop served some other purpose. See
 19 *United States v. Choudhry*, 461 F.3d. 1097, 1102 (9th Cir. 2006).

20 A traffic violation is sufficient to justify an investigatory stop even if (1) the violation was
 21 merely pretextual, *Whren*, 517 U.S. at 811–12; (2) the stop departed from the regular practice of a
 22 particular precinct, *id.* at 814–15; or (3) the violation was common and insignificant, *id.* at 818–
 23 19. If police have reasonable suspicion to believe a violation of a traffic code has occurred, the
 24 stop is reasonable under the Fourth Amendment and evidence recovered from a stop is admissible.
 25 *Choudhry*, 461 F.3d. at 1102.

26 It is undisputed that Franco was observed driving westbound on Lake Mead Boulevard on
 27 the date of his arrest. Officer Donovan used his binoculars to check the license plate while it was
 28 driving on Lake Mead. When he ran the plates through police records, the license plates returned

1 as “cold plated” or “no return” meaning the plates did not belong on the vehicle. It is undisputed
2 that driving with fictitious license plates, or plates that do not belong on a vehicle, is a violation of
3 Nevada traffic law. NRS 482.545 makes it unlawful for any person to operate, or an owner or
4 operator to knowingly permit the operation on a highway, of a vehicle “which is not registered or
5 does not have attached thereto and displayed thereon the number of plate or plates assigned
6 thereto” by the Department of Motor Vehicles “for the current period of registration or calendar
7 year....” The court finds the officers had reasonable suspicion to conduct a traffic stop to
8 investigate the fictitious license plate violation.

9 **III. Probable Cause for Arrest**

10 The motion to suppress also argues that because Franco was immediately removed from
11 the vehicle, laid over the hood of the patrol car, placed in handcuffs and frisked, he was arrested
12 without probable cause. The government’s opposition concedes that Franco was detained, but
13 asserts officers had reasonable suspicion to conduct an investigatory detention that developed
14 probable cause for his arrest.

15 To comply with the Fourth Amendment a warrantless arrest must be supported by probable
16 cause. *Michigan v Summers*, 452 U.S. 692, 700 (1981). “Probable cause for an arrest exists when
17 officers have knowledge or reasonably trustworthy information sufficient to lead a person of
18 reasonable caution to believe that an offense has been or is being committed by the person being
19 arrested.” *United States v Lopez*, 482 F 3d 1067, 1072 (9th Cir. 2007) (citing *Beck v. Ohio*, 379
20 U.S. 89, 91 (1964)). Probable cause is an objective standard, and the officers’ subjective intention
21 about the crime for which they thought they were arresting a defendant “is immaterial in judging
22 whether their actions were reasonable for Fourth Amendment purposes.” *Id.* Additionally, the
23 officers’ “subjective reason for making the arrest need not be the criminal offense as to which the
24 known facts provide probable cause.” *Id.*

25 In this case, Franco was taken into physical custody, placed in handcuffs, patted down and
26 given *Miranda* warnings almost immediately after he was stopped and got out of the vehicle. He
27 was ordered to sit on the sidewalk and clearly not free to leave at any point before he was
28 transported to jail on the felon in possession of firearm charge nearly four hours later. Franco was

1 clearly seized for purposes of the Fourth Amendment. His liberty was restrained and a reasonable
2 innocent person in his position would not feel free to ignore the police presence and go about his
3 business. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991). The officers applied physical force
4 and Franco submitted to their show of authority. *See California v. Hodari D.*, 499 U.S. 621, 626
5 (1991).

6 The court finds that, at the time of the initial stop, officers Donovan and Abel had
7 reasonable suspicion to believe Franco was operating a cold plated vehicle, *i.e.*, a vehicle with
8 license plates that did not belong to the vehicle. Nevada law authorizes an arrest for driving a
9 vehicle that is not registered or displaying plates assigned by DMV or operating with fictitious
10 plates, or plates that have been “cancelled, revoked, suspended or altered.” NRS 482.545(1), (2).
11 The stop was called into dispatch at 10:35:10 as “poss cold plated no return on plate”. *See* CAD
12 report, Government’s Exhibit 5.

13 The court found the officers’ testimony credible that when Franco got out of the vehicle
14 they observed something fall from his person. Donovan testified it was a makeshift key or shaved
15 key with tape around it, another indication the vehicle may have been stolen. The officers’
16 uncontroverted testimony is that a shaved or stripped key is a common burglary tool. Possession
17 of tools commonly used for burglaries “under circumstances evincing an intent to use” it in the
18 commission of a crime is a gross misdemeanor under Nevada law. NRS. 205.080. Within
19 moments of the stop, dispatch was advised at 10:35:59 of a “poss 411 [stolen vehicle] ... Key is
20 stripped in the ignition.” *Id.* Before the stop, officers were aware that older model Honda Accords
21 were frequently stolen vehicles. Franco was identified and a records check was conducted, which
22 reflected Franco had prior felony convictions for weapons offenses and possession of stolen
23 vehicle. While Abel stayed with Franco, Donovan did a protective sweep of the vehicle from the
24 outside to make sure no one else was in the car. He observed the shaved key on the floorboard.
25 Donovan testified “this is your basic stolen vehicle scenario.”

26 The VIN was obtained to determine if the vehicle was reported stolen. While obtaining
27 the VIN, officers observed the steering column had been tampered with and the center console was
28 empty where the stereo should have been. Attempts were made to identify the registered owner.

1 Checks with Nevada and California DMV were negative. Officers checked with Arizona and
2 found the registered owner was listed as Thomas Alley. Initial attempts to reach Alley were
3 unsuccessful. The court finds that under the totality of the circumstances officers initially had
4 reasonable suspicion to conduct the traffic stop and developed probable cause within minutes of
5 the stop to arrest Franco for driving with fictitious plates, possession of a burglary tool (the shaved
6 key) and possession of stolen vehicle. However, as Officer Abel testified, when Sarah came out
7 of the Wal-Mart and approached investigating officers, things changed.

8 The motion to suppress argues that although officers may have initially have had probable
9 cause to arrest Franco, they obtained information during their investigation that dissipated probable
10 cause. The reply argues officers learned sufficient information minutes *after* Officer Hagar
11 searched the car and found the gun that dissipated any probable cause to believe that Franco had
12 committed any crime. Specifically, the reply argues that Sarah West told officers that she was the
13 owner of the vehicle, she had proof of ownership at her residence, her father was the registered
14 owner, and she had put license plates from another vehicle on the Honda. Additionally, Franco
15 was cooperative, truthfully identified himself, answered police questions, and police were aware
16 the owner of the car had a concealed weapons permit. Thus, police no longer had probable cause
17 for Franco's arrest for any crime.

18 In *United States v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005), *cert denied*, 549
19 U.S. 876 (2006), the Ninth Circuit held that “[a] person may not be arrested, or must be released
20 from arrest, if previously established probable cause has dissipated.” Police may rely on the
21 totality of facts and circumstances available to them to establish probable cause, and as a corollary
22 to this rule “they also may not disregard facts tending to dissipate probable cause.” *Id.* Citing
23 cases from the Fifth and Seventh Circuits, *Ortiz-Hernandez* held that “[t]he continuation of even
24 a lawful arrest violates the Fourth Amendment when the police discover additional facts
25 dissipating their earlier probable cause.” *Id.*

26 The court finds that the police investigation developed facts that dissipated probable cause
27 to arrest Franco for the cold plate violation, possession of burglary tools, and possession of stolen
28 vehicle. The CAD report reflects that police identified Thomas Alley as the registered owner at

1 10:50:38. A request for information on a possible registered owner at an address at 1609
2 Cresthaven was requested at 10:53:56. It seems clear this is the address Sarah gave officers telling
3 them she had proof of ownership at her residence. A subsequent entry on 10:57:46 indicates
4 officers were en route to a possible registered owner at the 1609 Cresthaven address, that there
5 were “priors at this res,” and a citation showed “fem Sarah Alley West . . . not the ro of veh tho.”
6 A minute later, at 10:58:47 a request was made to the Arizona Police Department to contact the
7 registered owner of the vehicle in Chloride, Arizona, and to see if he knew where his vehicle was.

8 Officers asked Sarah to attempt to reach her father and a voicemail was left at the number
9 she provided. It is unclear exactly when officers communicated directly with Mr. Alley. However,
10 Officer Donovan’s affidavit supporting the telephonic search warrant obtained in this case
11 indicates contact had been made with Thomas Alley, the “title holder” on the vehicle. The search
12 warrant was applied for at 1:40 p.m. Officer Donovan’s application and affidavit indicates that
13 Officer Abel contacted Mr. Alley who stated that his daughter was allowed to have the car. It is
14 therefore clear that probable cause to arrest Franco for the cold plate violation, possession of
15 burglary tools, and possession of a stolen vehicle had dissipated before the search warrant was
16 applied for at 1:40 p.m.

17 However, officer Hager found the bullets and firearm long before probable cause for the
18 other three offenses dissipated. Hager was aware before he searched the car that a records check
19 reflected Franco had 10 prior felony convictions, which included weapons related offenses. As
20 the Ninth Circuit’s decision in *United States v. Lopez*, 482 F.3d 1067 (9th Cir. 2007), makes clear,
21 in a situation in which investigating officers learn information that dissipates probable cause, the
22 “critical question” is whether “the totality of the circumstances available to police provide probable
23 cause” at the time the evidence was obtained. *Id* at 1073.

24 In *Lopez*, the police believed they had probable cause to arrest Lopez as a principal in an
25 attempted shooting. Lopez was taken to the police station where he was questioned and gave
26 written consent to search. Lopez filed a pretrial motion to suppress arguing his Fourth and Fifth
27 Amendments rights had been violated because the police lacked probable cause to arrest him. The
28 district court denied the motion.

1 On appeal the Ninth Circuit found that facts gathered after his initial detention “tended to
2 dissipate, rather than support probable cause to believe Lopez was the attempted shooter” by the
3 time he was brought to the police station, questioned, and gave written consent to search. *Id* at
4 1075. However, because established precedent allowed the court to affirm on any basis supported
5 by the record, the Ninth Circuit examined the record and found the police had probable cause to
6 arrest Lopez as an accessory to the crime. *Id* at 1076. The court found that although it was possible
7 Lopez was an unwitting acquaintance of the shooter, and there may have been plausible, innocent
8 explanations for Lopez’s conduct, “the police were not required to believe to an absolute certainty,
9 or by clear and convincing evidence, or by a preponderance of the evidence, that Lopez had
10 committed a crime—what was required was a fair probability, given the totality of the
11 circumstances.” *Id*. Finding probable cause to arrest Lopez as an accessory after the fact, the court
12 held that at the time Lopez signed the consent to search police had probable cause to arrest, albeit
13 for a different crime than the police believed, and his consent to search was therefore voluntary.
14 The Ninth Circuit therefore upheld the district judge’s denial of Lopez’s motion to suppress.

15 Here, the court finds that at the time the bullets and gun were discovered police still had
16 probable cause to arrest Franco for the cold plate violation, possession of burglary tools, and
17 possession of stolen vehicle. Probable cause for these offenses did not dissipate until police spoke
18 with Sarah, obtained information from her, sent an officer to her residence to locate ownership
19 paperwork, ran a records check confirming that Thomas Alley was the registered or titled owner,
20 and spoke with Mr. Alley who confirmed that Sarah had permission to have the car. Ms. West
21 denied knowing a gun was in the car, even after Officer Able told her that “if it was hers it’s fine.”
22 Police were aware that Mr. Alley had a concealed weapons permit and asked him whether the gun
23 found in the car was his, which he denied. Under the totality of the circumstances police had
24 probable cause to arrest Franco for felon in possession of a firearm when the firearm and bullets
25 were found in the Honda.

26 However, it is undisputed that the search of the Honda was conducted without a warrant.
27 The critical question is whether the government has met its burden of establishing an exception to
28 the warrant requirement authorized the search and seizure. The government claims the decision

1 to tow the vehicle was made shortly after the stop, and that even if Officer Hagar searched the
2 vehicle prematurely, the firearm and other evidence would have been inevitably discovered in a
3 lawful inventory search pursuant to LVMPD impound policy.

4 **IV. The Automobile Search**

5 A warrantless search of a vehicle is per se unreasonable under the Fourth Amendment,
6 subject to only a “few specifically established and well-delineated exceptions.” *United States v.*
7 *Cervantes*, 703 F.3d 1135, 1138–39 (9th Cir. 2012) (citing *Katz v. United States*, 389 U.S. 347,
8 357 (1967)); *United States v. Brown*, 563 F.3d 410, 414 (9th Cir.2009) (citing *United States v.*
9 *Murphy*, 516 F.3d 1117, 1120 (9th Cir. 2008)). The government bears the burden of establishing
10 a warrantless search or seizure falls within one of these exceptions. *Cervantes*, 703 F.3d at 1141.

11 In *Carroll v. United States*, 267 U.S. 132 (1925), the Supreme Court held that the Fourth
12 Amendment does not require a search warrant to search an automobile if the officers have probable
13 cause to believe the vehicle contains contraband. *Id.* at 153–162. The rationale for the automobile
14 exception to the search warrant requirement is based on the inherent mobility of vehicles, and the
15 recognition that individuals have a reduced expectation of privacy in their automobiles. *See, e.g.,*
16 *United States v. Scott*, 705 F.3d 410, 417 (9th Cir. 2012) (stating “the automobile exception is
17 justified by the exigency created by the inherent mobility of vehicles as well as the relatively
18 minimal expectation of privacy that exists with respect to automobiles”). The automobile
19 exception to the search warrant requirement applies whether or not the car’s owner or driver has
20 already been taken into custody or the risk of the inherent mobility of the automobile has been
21 eliminated. *Id.* As long as police have probable cause to believe that the vehicle contains evidence
22 of a crime, the automobile exception to the warrant applies. *Id.* (citing *United States v. Brooks*,
23 610 F.3d 1186, 1193 (9th Cir. 2010)). The probable cause determination is based on a totality of
24 the circumstances. *Id.*

25 Probable cause exists where there is a “fair probability that contraband or evidence of a
26 crime will be found in a particular place, based on the totality of the circumstances.” *Dawson v.*
27 *City of Seattle*, 435 F.3d 1054, 1062 (9th Cir. 2006) (citing *Illinois v. Gates*, 462 U.S. 213, 238
28 (1983)). Probable cause is “a fluid concept-turning on the assessment of probabilities in particular

1 factual contexts-not readily, or even usefully, reduced to a neat set of legal rules.” *Gates*, 462 U.S.
 2 at 232. Probable cause does not deal with hard certainties, but with probabilities. *Id.* at 241.

3 The government does not claim that police had probable cause to search the vehicle under
 4 the automobile exception to the warrant requirement. Rather, the government maintains that the
 5 police had probable cause to arrest Franco, and because officers decided to impound the vehicle
 6 within minutes of the stop, the firearm would have inevitably been discovered pursuant to standard
 7 LVMPD policy during a lawful inventory search.

8 **V. Impound or Inventory Searches**

9 The government contends that the search was a lawfully conducted inventory search
 10 pursuant to LVMPD impound policy because ownership and rightful possession of the vehicle was
 11 in doubt, and because the vehicle could not be lawfully driven without valid registration and license
 12 plates. If the court finds Officer Hagar “jumped the gun” and searched the car prematurely, the
 13 government’s fallback position is the firearm and other evidence would eventually have been
 14 inevitably discovered in an inventory search because the decision to tow the vehicle was made
 15 shortly after the stop, and the impound was authorized by department policy. Franco argues that
 16 the impoundment of the car was not justified by any of the 12 reasons stated in LVMPD’s policy
 17 manual, nor under the community caretaking doctrine.

18 The impoundment of a vehicle is a seizure within the meaning of the Fourth Amendment.
 19 *Miranda v. City of Cornelius*, 429 F.3d 858, 862 (9th Cir. 2005). The government has the burden
 20 of justifying a vehicle impoundment under one of the exceptions to the warrant requirement. *Id.*
 21 Inventory searches have been held constitutional if they are conducted in accordance with the
 22 standard procedures of the agency conducting the search or come under another exception to the
 23 Fourth Amendment warrant requirement. *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1036
 24 (9th Cir. 1997), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir.
 25 2000). Inventory procedures protect an owner’s property while it is in the custody of the police,
 26 ensure against claims of lost, stolen, or vandalized property, and guard the police from danger.
 27 *See Colorado v. Bertine*, 479 U.S. 367, 372 (1987). The Supreme Court has held that standardized
 28 criteria or established routine must regulate opening containers found during inventory searches

1 so that an inventory search is not used as a pretext for general rummaging to discover incriminating
2 evidence. *Florida v. Wells*, 495 U.S. 1, 4 (1990). The policy or practice of a law enforcement
3 agency governing inventory should be designed to produce an inventory; the individual police
4 officer must not be allowed so much discretion that an inventory search becomes a “purposeful
5 and general means of discovering evidence of a crime.” *Id.*

6 The Ninth Circuit has also recognized that an impoundment may be proper under the
7 community caretaking doctrine if the driver’s violation of a vehicle regulation prevents the driver
8 from lawfully operating the vehicle, and it is necessary to remove the vehicle from an exposed or
9 public location. *See Cornelius*, 429 F.3d at 865 (citing *United States v. Gutierrez*, 995 F.2d 169,
10 171 (9th Cir. 1993) (both cases finding where defendant had no valid driver’s license, he could not
11 drive his vehicle away). However, a decision to impound a vehicle that is not consistent with the
12 police’s role as “caretaker of the streets” may be unreasonable. *Id.* The Ninth Circuit has found
13 that in determining whether to impound a vehicle after a driver has violated a vehicle regulation,
14 a police officer must consider the location of the vehicle and whether the vehicle was actually
15 “impeding traffic or threatening public safety and convenience” on the streets such that
16 impoundment was warranted. *Id.* (citing *South Dakota v. Opperman*, 428 U.S. 364, 371 (1976)).
17 An officer cannot reasonably order an impoundment in situations where the location of the vehicle
18 does not create any need for the police to protect the vehicle or to avoid a hazard to other drivers.
19 *Id.* (internal citation omitted).

20 The court finds the impound was clearly not justified under the community caretaking
21 doctrine as the Honda was parked in a private parking lot, and the officers testified it was not
22 impeding traffic or threatening public safety. There is no testimony in the record that would
23 support a finding that the officers had a reasonable belief the vehicle would be stolen or vandalized
24 if it was left where it was parked. In *Cornelius*, the Ninth Circuit found that the need to deter a
25 driver’s unlawful conduct was insufficient, of itself, to justify a tow under the caretaker rationale.
26 *Id.* at 866. Therefore, the government bears the burden of establishing that the search of the vehicle
27 was a lawful inventory search conducted in accordance with LVMPD policies and procedures for
28 impoundment.

1 Both Donovan and Abel testified that the decision to tow the vehicle was made shortly
2 after the stop. Both testified to various reasons supporting the decision to tow. They testified that
3 a tow was justified under department policy because ownership and rightful possession was in
4 doubt, and because the vehicle was cold plated, not registered, and could not be lawfully operated.
5 Abel at first did not recall that he was the officer who filled out the impound report. He was shown
6 the report, and it was pointed out that he had not filled in the section identifying the reason for the
7 impound. He then testified this was an oversight, and that if he had filled in this section of the
8 form he would have written that the reason was because the driver was arrested. The government
9 does not claim in its opposition to the motion to suppress that the impound was authorized
10 because of Franco's arrest.

11 The government argues that the impoundment was justified by 2 of the 12 circumstances
12 LVMPD policy authorizes for impoundment. First, the government relies on LVMPD policy
13 5/204.06(6), which authorizes an impoundment when ownership and rightful possession by the
14 driver is in doubt. The court disagrees. For the reasons explained earlier in this report and
15 recommendation, probable cause to believe the vehicle was stolen, or that Franco was responsible
16 for the fictitious plates, or in possession of burglary tools, had dissipated before the telephonic
17 search warrant was applied for at 1:40 p.m. The tow was not requested until 2:19 p.m., presumably
18 because officers were preparing and obtaining the search warrant before physically recovering
19 evidence from the vehicle. Before the tow was requested officers could no longer rely on "doubt
20 about the ownership or rightful possession" of the Honda to justify its impoundment.

21 Donovan's application and affidavit supporting the state telephonic search warrant states
22 that because of the suspicious nature of the "vehicle status," the fact that Franco had a shaved key,
23 and that he was a 10-time convicted felon, "the vehicle was going to be towed for safekeeping and
24 an inventory was begun by Officer Hager" who "located a small bag that contained a small amount
25 of pistol ammunition in the passenger side floorboard and a firearm, holstered, inside an open
26 compartment where the stereo should be." The record does not support a finding that Hager was
27 conducting an inventory search at the time he found the bullets in a Crown Royal bag on the

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1 floorboard on the passenger side or the gun in the center console. In Hagar's own words he was
2 "just searching."

3 Officer Hager arrived a few minutes after Donovan and Abel made the initial stop. Franco
4 told officers he had given his friend Sarah a ride to the Wal-Mart, she was the owner of the vehicle,
5 and she was in the store. Hager entered the vehicle, initially on the passenger side wondering out
6 loud on the video whether any paperwork belonging to the vehicle was inside. There is no
7 testimony he went into the glove box or any other area where registration or other proof of
8 ownership might be found. Rather, as he admitted during the evidentiary hearing, he saw a purple
9 Crown Royal bag on the floorboard, opened it, found bullets and immediately asked Franco where
10 the gun was. He acknowledged that he was not looking for vehicle paperwork when he opened
11 the bag, but was "just searching." A few moments later he walked around to the driver's side, slid
12 the front seat forward and found the gun in the empty center console area. Dispatch was advised
13 at 10:48:58, approximately 10 minutes after the initial stop, that the gun was found in the center
14 console area. This initial search, and discovery of the bullets and gun occurred before Sarah came
15 out of the Wal-Mart and made contact with officers. The bullets and gun were also found before
16 Thomas Alley was identified as the registered owner at 10:50:38.

17 However, a tow was not requested until 2:19 p.m., hours after officers learned that the
18 registered owner was Thomas Alley. As Officer Donovan's affidavit and search warrant
19 application makes clear, sometime before 1:40 p.m. when the search warrant was requested,
20 Officer Abel had spoken to Mr. Alley who confirmed that the vehicle was his and that Sarah had
21 permission to have it. The search warrant application represented to Judge Tobiasson that Alley
22 was the title owner of the vehicle. Thus, by the time the tow was requested and the impound report
23 was filled out, officers no longer had a reasonable belief that the vehicle was stolen or reasonable
24 doubt about ownership and rightful possession by the driver.

25 The government also relies on LVMPD policy 5/204.6(10), which authorizes vehicle
26 impound "in other circumstances, in accordance with the prescribed authority and conditions
27 defined in the Las Vegas City Code, Clark County Ordinances, and Nevada Revised Statutes."
28 The court finds the impound was authorized by this policy provision. It is undisputed that the

1 vehicle was not registered and was displaying plates that did not belong to it. Sarah admitted
2 putting plates on the Honda from another vehicle. She told officers at the scene that she put the
3 plates on the vehicle because she did not have money to register it and did not want to be stopped
4 by the police. She also testified at the evidentiary hearing that the car was hers, although it was in
5 her father's name so that her husband would not get the car in their divorce, and that she was the
6 one who put the plates from another vehicle on the car. It is unlawful under NRS 482.545 to
7 operate a vehicle that is not registered or does not have current license plates assigned to it by the
8 Department of Motor Vehicles. Because it was unlawful to drive the vehicle away from the
9 parking lot, this policy provision authorized impound of the vehicle. The LVMPD policy requires
10 officers to "thoroughly search vehicles and containers located therein" and to inventory personal
11 property on a vehicle impound report. Thus, although Hagar was clearly not performing an
12 inventory search when he discovered the bullets and firearm, LVMPD authorized the impound and
13 required impounding officers to "thoroughly search vehicles and containers" located in the vehicle
14 and to inventory personal property on a vehicle impound report. The court therefore finds that the
15 evidence Franco seeks to suppress would inevitably have been discovered in accordance with
16 standard department policies and procedures.


17 "The inevitable discovery doctrine is an exception to the exclusionary rule." *United States*
18 *v. Ruckes*, 586 F 3d 713, 718 (9th Cir. 2009) (quoting *United States v. Andrade*, 784 F 2d. 1431,
19 1433 (9th Cir 1986)). It permits the government to rely on evidence that ultimately would have
20 been discovered in the absence of a constitutional violation. *Nix. v. Williams*, 467 U.S. 431, 443
21 (1984). In *Nix*, the Supreme Court explained that if the prosecution establishes by a preponderance
22 of the evidence that the information or evidence "ultimately or inevitably would have been
23 discovered by lawful means" the evidence should be admitted because the deterrence rationale for
24 the exclusionary rule "has so little basis." *Id.* at 444. The court finds the government has met its
25 burden of establishing that the firearm and bullets would ultimately and inevitably have been
26 discovered in an inventory search conducted pursuant to LVMPD policy to impound a vehicle
27 when it cannot be lawfully operated with current registration and license plates assigned to it by
28 the Nevada Department of Motor Vehicles as required by NRS. 482.545.

CONCLUSION

Having reviewed and considered the matter, and for the reasons explained at length,

IT IS RECOMMENDED that Franco's Motion to Suppress Evidence (ECF No. 23) be
DENIED.

DATED this 31st day of March, 2017.


PEGGY A. LEEN
UNITED STATES MAGISTRATE JUDGE